A

PEK WOEI YI & ANOR v. PP & ANOTHER APPEAL

HIGH COURT MALAYA, IPOH
BHUPINDAR SINGH JC
[CRIMINAL APPEAL NOS: AA-41S-14-07-2019
& AA-41H-24-08-2019]
B 13 DECEMBER 2021

Abstract – *The charge against the accused for an offence under s. 13B(1) of the Food Act 1983 (for selling bottled mineral waters containing sulphate and chloride) is unsustainable. Sub-regulation 360A(11) of the Food Regulations 1985 along with the clarification from the Food Safety and Qualify Division of the Ministry of Health permit minerals such as sulphate and chloride to be include in mineral waters sold in the country. The charge is also defective as the prosecution fails to prove the capacity in which the accused is charged; it is a substantive error relating to the ingredient of the charge and is incurable in law.*

FOOD & DRUGS: *Food control – Offences under Food Act 1983 – Mineral water sold by accused contained sulphate and chloride – Whether permissible in Malaysia – Whether proceedings against accused initiated within time limit provided under s. 19(2) of Food Act 1983 – Whether charge against accused defective – Whether there was non-compliance with sub-reg. 360A(7) of Food Regulations 1985 – Whether there was offence committed by accused – Whether conviction and sentence ought to be set aside*

CRIMINAL PROCEDURE: *Charge – Defective – Allegation of – Error in stating offence or particulars required to be stated in charge – Failure to prove capacity in which accused was charged – Whether charge was not drafted accurately – Whether substantive error curable – Whether caused injustice to accused*

The accused was charged with an offence under s. 13B(1) read together with para. 13B(2)(d) of the Food Act 1983 ('Act') and punishable under s. 13B(4) of the Act. On 11 April 2018, SP1, an authorised officer under the Act, purchased three bottles of natural mineral water ('mineral water') at an outlet of 7 Eleven from one Nor Fatin Izzati as samples for the purpose of analysis. SP1 then complied with the procedure of taking samples for analysis as provided under reg. 4 of the Food Regulations 1985 ('FR') and labelled the samples according to reg. 6 of the FR. On the same day, SP1 requested the analysis of the mineral water and handed a bottle of the mineral water to SP2, an analyst appointed under s. 3(1) of the Act, who conducted the analysis and confirmed that the sample provided contained 33 mg/L of sulphate and 13.4 mg/L of chloride. SP3 testified that sulphate and chloride were not permissible in Malaysia. At the end of the trial, the Magistrate

convicted and sentenced the accused to a fine of RM9,000 in default 12 months' imprisonment. Dissatisfied with the decision, the accused appealed against the conviction and sentence while the prosecution cross-appealed against the sentence imposed by the Magistrate. The issues that arose were: (i) whether the prosecution failed to initiate the proceedings within the time limit provided under the Act as the charge was registered 154 days in contravention of s. 19(2) of the Act; (ii) whether the charge against the accused was defective as it did not connect the accused to the alleged offence; and (iii) whether the accused had not complied with reg. 360A(7) of the FR.

Held (allowing appeal of accused; dismissing prosecution's appeal):

(1) SP1 had purchased the mineral water on 11 April 2018. According to para. 54(1)(a) of the Interpretation Acts 1948 and 1967 ('Interpretation Acts'), that day was excluded, and time started to run from 12 April 2018. The 150th day fell on 8 September 2018, which was a Saturday and a public holiday. The next three days were also public holidays (Sunday, Keputeraan Yang di-Pertuan Agong and Awal Muharam), therefore pursuant to para. 54(1)(b) of the Interpretation Acts, the last day to file the case fell on 12 September 2018. A perusal of the appeal record disclosed that this case was filed on 12 September 2018. Thus, it was abundantly clear that the prosecution instituted the proceedings within the time stipulated under s. 19(2) of the Act. (para 9)

(2) The charge framed was not against Malee Mineral Water Sdn Bhd ('company') but was against the accused (Pek Woei Yi) personally. The wording of the charge states that "Oleh yang demikian kamu selaku pemilik Pek Woei Yi telah melakukan satu kesalahan di bawah s. 13B(1) dibaca bersama s. 13B(2)(d), Akta Makanan 1983 …". From the language of the charge, the accused was not charged severally in any capacity as mentioned in s. 33A of the Act. But the accused was charged as the owner, presumably of the company. It is an established principle of law that a company is a separate legal entity. As the charge stands, the accused was charged as an owner and not as a director of the company. The company was never charged as a manufacturer of the mineral water. The accused was a director and minority shareholder of the company. Definitely, the accused was not the owner of the company. Hence, the prosecution failed to prove the capacity in which the accused was charged. (paras 11 & 13)

(3) Section 156 of the Criminal Procedure Code ('CPC') is only applicable where there is an error in stating the offence or the particulars required to be stated in the charge or any omission thereof. In the charge, the offence and particulars required to be stated were correctly specified.

A One of the ingredients of the offence that the prosecution must prove is that the accused was the owner of the company. The accused was charged in that capacity. In fact, the words of the charge did not precisely stipulate what the accused owned, as it stated "kamu selaku pemilik Pek Woei Yi ...". Indeed, the prosecution failed to draft the
B charge correctly and accurately. Be that as it may, the prosecution had not attempted to amend the charge at any stage of the trial. According to the charge, one of the main ingredients of the offence was that "the accused is the owner". If there was any error, it was a substantive error relating to the ingredient of the charge and not merely a technical defect
C that was curable. The error in the charge had prejudiced and caused injustice to the accused. Therefore, there had been a substantial miscarriage of justice. The conviction against the accused was not safe and must be quashed. (paras 16 & 17)

(4) Regulation 2(5) of the FR provides that food for which such standard is
D prescribed shall not contain any added substance unless expressly permitted. Besides the substances allowed in the Twenty-Sixth Schedule of the FR, other substances specifically permissible in the mineral water, as stated on the package label, are dissolved solids and minerals. Since the FR requires that the amount of dissolved solids and minerals be
E expressly written on the mineral water package label, it lawfully indicates that these substances are allowed to be present in the mineral water. It would be unreasonable and absurd to argue that the substances stated on the mineral water package label were not allowed to be present in the mineral water. If so, then the package label of the mineral water under sub-reg. 360A(11) of the FR does not serve any purpose at all. The
F draftsman of sub-reg. 360A(11) definitely had a purpose in inserting the said provision under the FR. Furthermore, sub-reg. 360A(11)(b) and (c) unambiguously provide that 'total dissolved solids present' and 'name of the mineral contents present' which further substantiated that these substances were allowed to be present in the mineral water. (paras 22-
G 25)

(5) In Malaysia, the standard for water permits the presence of sulphate (SO_4) and chloride (Cl) to an acceptable limit of 250 mg/L. Sulphate and chloride are minerals. Under sub-reg. 360A(11) of the FR, mineral contents are allowed to be present in the mineral water. The types of
H minerals that are permitted are not specified under the FR. In addition, the permissible limit in mg/L of the minerals is also not regulated under the FR. It is crystal-clear that the law allows all minerals with no maximum limit of the amount in mg/L to be present in the mineral water. If the FR intends to regulate the types of minerals and amount in
I mg/L, it must legislate explicit provisions on this matter. (paras 32 & 33)

(6) The law requires that the label on the mineral water package must specify the name of the mineral contents present and the amount in mg/L. As stated in D38 and Table A, all the other mineral water brands contain sulphate and chloride together with other minerals such as potassium, calcium, sodium, magnesium and bicarbonate. All these minerals are not listed under the Twenty-Sixth Schedule of the FR. In short, these minerals are permissible pursuant to sub-reg. 360A(11) of the FR. The Food Quality Division in Putrajaya approved the label for the mineral water package. This fact further confirmed that the mineral contents were allowable in the mineral water. Thus, the minerals of sulphate and chloride are permitted in the mineral water and the charge against the accused was unsustainable. As the Food Safety and Quality Division of the Ministry of Health, the authoritative body in Malaysia on food safety, clearly explained that sulphate and chloride are mineral contents present in mineral water, there was no offence committed by the accused. Accordingly, the conviction of the accused was quashed and the sentence set aside. (paras 34, 35, 43 & 44)

Case(s) referred to:

Carlsberg Brewery Malaysia Bhd v. PP [1993] 1 LNS 4 HC ***(refd)***
Chiew Chiu Sing v. Dato' Seri Tiong King Sing [2004] 8 CLJ 82 HC ***(refd)***
Kentucky Fried Chicken (M) Sdn Bhd v. Lembaga Bandaran, Petaling Jaya [1975] 1 LNS 71 HC ***(refd)***
Krishnadas Achutan Nair & Ors. v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***
Kumaran Suppiah v. Dato' Noh Hj Omar & Anor [2006] 4 CLJ 675 FC ***(refd)***
Lim Kheak Teong v. PP [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207 FC ***(refd)***
Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd [2020] 9 CLJ 213 FC ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(refd)***
Mohd Yusri Mangsor & Anor v. PP [2014] 7 CLJ 897 CA ***(refd)***
Murugayah v. PP [2004] 2 CLJ 489 CA ***(refd)***
PP v. Lew Koy [2002] 1 CLJ 86 HC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
Ravindran Ramasamy v. PP [2015] 3 CLJ 421 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 156, 422
Food Act 1983, ss. 3(1), 13B(1), (2)(d), (4), 19(2), 33A
Food Regulations 1985, regs. 4, 6, 360A(7), (11)(b), (c)
Interpretation Acts 1948 and 1967, s. 54(1)(a), (b)

For the appellant - Ramesh Lachmanan & Kiran Kaur Ram Ramu Naido; M/s Nith, Gowri, Lachman & Partners
For the respondent - Nurul Wahida Jalaluddin; DPP

Reported by Suhainah Wahiduddin

A

JUDGMENT

Bhupindar Singh JC:

Introduction

[1] The accused was charged with an offence under sub-s. 13B(1) read
B together with para. 13B(2)(d) of the Food Act 1983 ('the Act') and punishable under sub-s. 13B(4) of the Act. At the end of the trial, the learned Magistrate convicted and sentenced the accused to a fine of RM9,000 in default 12 months imprisonment. Dissatisfied with the decision, the accused appealed against the conviction and sentence (Appeal No: AA-41S-14-07-
C 2019). The prosecution cross-appealed against the sentence imposed by the learned Magistrate (Appeal No: AA-41H-24-08-2019). Both appeals were heard together.

[2] The charge framed against the accused is as follows:

D

> Bahawa kamu pada 11.04.2018, jam lebih kurang 10.55 pagi bertempat di 7-Eleven Malaysia Sdn. Bhd. 91, Jalan Aman Taman Aman 31950 Mambang Diawan, Perak di dalam Daerah Kampar dalam Negeri Perak telah menjual 3 botol Air Mineral kepada Pegawai Berkuasa Akta Makanan 1983 Pejabat Kesihatan Daerah Kampar, Perak melalui Nor Fatin Izzati Binti Shohaimi. Setelah dianalisa didapati Air Mineral
E tersebut mengandungi Sulphate sebanyak 33 mg/L dan Chloride sebanyak 13.4 mg/L. Kehadiran Sulphate dan Chloride di dalam air mineral adalah tidak mematuhi standard sebagaimana yang ditetapkan dalam Jadual Kedua Puluh Enam di bawah peruntukan Subperaturan 360A(7) dibaca bersama Subperaturan 2(5), Peraturan-Peraturan Makanan 1985. Oleh yang demikian kamu selaku pemilik Pek Woei Yi telah
F melakukan satu kesalahan di bawah Seksyen 13B(1) dibaca bersama Seksyen 13B(2)(d), Akta Makanan 1983 iaitu menjual makanan yang mengandungi apa-apa bahan yang penambahannya tidak dibenarkan di bawah Akta ini atau mana-mana peraturan yang dibuat di bawah Akta ini. Jika disabitkan kesalahan kamu boleh dihukum di bawah Seksyen 13B(4) di bawah Akta yang sama.

G

Brief Facts Of The Case

[3] On 11 April 2018 at about 10.55am, Mohd Faizal bin Rasidi (SP1) an authorised officer under the Act, purchased three bottles of natural mineral water ('mineral water') at 7 Eleven Malaysia Sdn. Bhd. No. 91, Jalan Aman,
H Taman Aman, 31950 Mambang Diawan, Kampar, Perak from one Nor Fatin Izzati as samples for the purpose of analysis.

[4] SP1 then complied with the procedure of taking samples for analysis as provided under reg. 4 of the Food Regulations 1985 ('FR') and labelled the samples according to reg. 6 of the FR. On the same day, SP1 requested
I the analysis of the mineral water and handed a bottle of the mineral water to Rose Heldawati binti Che Rose (SP2).

[5] SP2, an analyst appointed under sub-s. 3(1) of the Act, conducted the analysis and confirmed that the sample provided contained 33 mg/L of sulphate and 13.4 mg/L of chloride (exh. P15). Dr. Husna Maizura binti Ahmad Mahir (SP3) testified that sulphate and chloride are not permissible in Malaysia at all. SP4, Muhammad Hanis bin Sharuddin is the investigating officer in this case.

The Law Relating To An Appeal

[6] It is trite that an appellate court should be slow in interfering with the findings of facts made by the trial court. However, the appellate court may disturb a finding of fact where the judgment is based upon a wrong premise of fact or law (see: *Mohd Yusri Mangsor & Anor v. PP* [2014] 7 CLJ 897; [2014] MLJ 875 and *Lim Kheak Teong v. PP* [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207; [1985] 1 MLJ 38).

[7] In *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389, the Court of Appeal held that:

> Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See, *Mohammad Husain v. Emperor* AIR [1945] Nag 441; *Zahari bin Yeop Baai v. PP* [1977] 1 LNS 162; [1980] 1 MLJ 160.

Issues And Findings Of The Court

Institution Of Proceedings

[8] At the outset, learned counsel for the accused submitted that the prosecution had failed to initiate the proceedings within the time limit provided under the Act. Accordingly, it was contended that the charge was registered after 154 days in contravention of sub-s. 19(2) of the Act. In support of his contention, learned counsel relied on the case of *Carlsberg Brewery Malaysia Bhd v. PP* [1993] 1 LNS 4; [1993] 1 MLJ 273.

[9] Sub-section 19(2) of the Act is produced as follows:

> 19(2) Where any food has been purchased or procured from any person for analysis or examination, no proceedings in respect of the sale thereof or of any offence against this Act shall be instituted after the expiration of one hundred and fifty days from the time of purchasing or procuring that food.

In the present case, SP1 purchased the mineral water on 11 April 2018. According to para. 54(1)(a) of the Interpretation Acts 1948 and 1967, that day is excluded, and time starts to run from 12 April 2018. The 150th day falls on 8 September 2018, which is Saturday and a public holiday. The next three days were also public holidays (Sunday, Keputeraan Yang di-Pertuan

Agong and Awal Muharam), therefore pursuant to para. 54(1)(b) of the Interpretation Acts 1948 and 1967, the last day to file the case falls on 12 September 2018. A perusal of the appeal record discloses that this case was filed on 12 September 2018 (RR Jilid 1 – p. M/S1). Thus, it is abundantly clear that the prosecution instituted the proceedings within the time stipulated under sub-s. 19(2) of the Act (see: *Carlsberg Brewery Malaysia Bhd* (*supra*), *PP v. Lew Koy* [2002] 1 CLJ 86, *Kentucky Fried Chicken (M) Sdn Bhd v. Lembaga Bandaran, Petaling Jaya* [1975] 1 LNS 71; [1976] 2 MLJ 145 and *Chiew Chiu Sing v. Dato' Seri Tiong King Sing* [2004] 8 CLJ 82). Therefore, I find that learned counsel's submission on this point is unacceptable.

The Charge

[10] Learned counsel argued that the charge against the accused is defective as it does not connect the accused to the alleged offence. Section 33A of the Act provides for an offence committed by a body corporate, where it states:

> 33A. Where a body corporate commits an offence under this Act or any regulations made under this Act any person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of the body corporate or was purporting to act in any such capacity, or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate, or was assisting in such management:
>
> (a) may be charged severally or jointly in the same proceedings with the body corporate; and
>
> …

[11] In the column of name in the charge, it is stated as:

> Pek Woei Yi
>
> Malee Mineral Water Sdn. Bhd. (No. Syarikat: 192792-A)
>
> Lot. 268, Batu 6, Jalan Jemaluang 86800 Mersing Johor

The charge framed in this case is not against Malee Mineral Water Sdn Bhd ('the company') but is against the accused (Pek Woei Yi) personally. The wording of the charge states that "Oleh yang demikian kamu selaku pemilik Pek Woei Yi telah melakukan satu kesalahan di bawah s. 13B(1) dibaca bersama s. 13B(2)(d), Akta Makanan 1983 …". From the language of the charge the accused was not charged severally in any capacity as mentioned in s. 33A of the Act. But the accused was charged as the owner, presumably of the company.

[12] The learned Magistrate in her judgment arrived at the following conclusion:

> [12] Maka, Mahkamah mendapati OKS bukanlah pihak yang salah di saman di dalam kes ini memandangkan beliau adalah salah seorang daripada **pengarah syarikat** ini sepertimana yang telah dikemukakan melalui ekshibit P26. Melalui keterangan SP1, SP4 serta ekshibit P19 dan P25, **syarikat milik OKS** ini juga telah dibuktikan sebagai **pengeluar** jenama Aktif air mineral tersebut ... (emphasis added)

[13] Based on the above observation, it is indeed apparent that the learned Magistrate erred in law and fact in her finding. It is an established principle of law that a company is a separate legal entity. As the charge stands, the accused was charged as an owner and not as a director of the company. The company was never charged as a manufacturer of the mineral water. According to exh. P26, the accused is a director and minority shareholder of the company. Definitely, the accused is not the owner of the company. Hence, the prosecution failed to prove the capacity in which the accused was charged.

[14] Learned Deputy Public Prosecutor ('DPP') maintained that the charge was not defective. The error was curable pursuant to ss. 156 and 422 of the Criminal Procedure Code ('CPC') as the accused was not misled by the error. Section 156 of the CPC reads as follows:

> 156. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[15] The Federal Court in *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421, when explaining the provision of s. 156 of the CPC held:

> [27] Pursuant to s. 156 of the CPC, "no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission" (the Indian equivalent, s. 215 of the Indian Criminal Procedure Code, ends with the words "and it has occasioned a failure of justice"). However, in view of s. 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. "Whether any court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s. 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice" (*Yap Sing Hock & Anor v. PP* [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356; [1992] 2 MLJ 714 at p. 364 (CLJ) and p. 725 (MLJ) per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).

A [28] **It could also be noted that the 'error' alluded to in s. 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence.** That important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss. 156 and or 422 of the CPC. This is because where it was an error or
B omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and that there must have been a failure of justice. *Low Seng Wah v. PP* [1961] 1 LNS 55; [1962] 1 MLJ 107, was the exceptional case, where Neal J held that the omission of an essential ingredient in the charge was not fatal, because of the unique provisions of s. 321 of the CPC (since repealed)
C which provided that "No judgment, sentence or order of Magistrate's court shall be reversed or set aside unless it is shown to the satisfaction of the court of a judge that such judgment, sentence or order was either wrong in law or against the weight of the evidence". *Low Seng Wah v. PP*, which was primarily decided under s. 321, is no precedent on s. 156 of the
D CPC.

[29] **But in cases decided primarily under ss. 156 and or 422 of the CPC, courts had refused to invoke those provisions where it was an error or omission in stating the ingredients of an offence.** (emphasis added)

[16] With respect, I cannot agree with the learned DPP's argument. Section
E 156 of the CPC is only applicable where there is an error in stating the offence or the particulars required to be stated in the charge or any omission thereof. In the charge, the offence and particulars required to be stated are correctly specified. One of the ingredients of the offence that the prosecution must prove is that the accused is the owner of the company. The accused is
F charged in that capacity. In fact, the words of the charge do not precisely stipulate what the accused owns, as it states "kamu selaku pemilik Pek Woei Yi ...". Indeed, the prosecution had failed to draft the charge correctly and accurately. Be that as it may, the prosecution had not attempted to amend the charge at any stage of the trial. According to the charge, one of the main
G ingredients of the offence is that "the accused is the owner". If there is any error, it is a substantive error relating to the ingredient of the charge and not merely a technical defect that is curable. It is my considered view that the error in the charge had prejudiced and caused injustice to the accused. Therefore, there has been a substantial miscarriage of justice.

H **[17]** Based on the above reasons, the conviction against the accused is not safe and must be quashed.

Non-compliance With Sub-regulation 360A(7) Of The FR

[18] Learned DPP contended that the accused committed an offence under
I sub-s. 13B(1) read together with para. 13B(2)(d) of the Act because he had failed to comply with the standard for mineral water under sub-reg. 360A(7) of the FR. The relevant provisions of the Act and FR are as follows:

Section 2 Interpretation

"food" includes every article manufactured, sold or represented for use as food **or drink for human consumption** or which enters into or is used in the composition, preparation, preservation, of any food or drink and includes confectionery, chewing substances and any ingredient of such food, drink, confectionery or chewing substances;

…

Section 13B Adulterated food

(1) No person shall prepare or **sell any adulterated food.**

(2) For the purposes of and without prejudice to the generality of subsection (1), any food shall be deemed to be adulterated if:

(a) ...

(b) ...

(c) …

(d) **it contains any substance** the addition of which is **not permitted by this Act or any regulations** made under this Act;

...

Regulation 2. Interpretation

(5) Where in these Regulations a standard is prescribed for any food without any expressed stipulation forbidding any added matter or substance, there shall be implied therein the stipulation that the food for which **such standard is prescribed shall not contain any added matter or substance,** other than potable water, **except as may be specifically permitted by these Regulations.**

Regulation 360A. Natural mineral water

(7) **Natural mineral water** in its packaged state **shall comply with the standard as prescribed in the Twenty-sixth Schedule.**

Twenty-sixth Schedule

(Subregulation 360A(7))

Standard For Natural Mineral Water

1. Chemical Standard:

Chemicals	Maximum permitted proportion in milligram per litre (mg/l)
Arsenic … … … … … … … …	0.05
Barium … … … … … … … … …	1
Borate (calculated as H_3 BO_3) … … … …	30
Cadmium … … … … … … … … …	0.01
Copper … … … … … … … …	1

Chromium (VI) … … … … … … … … … …	0.05
Cyanide (calculated as CN-) … … … … …	0.01
Fluoride (calculated as F-) … … … … …	2
Lead … … … … … … … … … ...	0.05
Manganese … … … … … … … … … …	2
Mercury … … … … … … … … … …	0.001
Nitrate (calculated as NO_3-) … … … … …	45
Nitrites (calculated as NO_2-) … … … … …	0.005
Organic matter (calculated as O_2) … … … …	3
Selenium … … … … … … … … … …	0.01
Sulphide (calculated as H_2S) … … … …	0.05
Zinc … … … … … … … … …	5

2. Bacteriological Standard:

…

3. Radioactivity:

…

[19] On this issue, the learned DPP pointed out that the sample of the mineral water contained 33 mg/L of sulphate and 13.4 mg/L of chloride. However, these substances are not listed in the Twenty-Sixth Schedule of the FR. Therefore, the accused has committed an offence as he sold adulterated mineral water which contained substances not permitted under the FR.

[20] On the other hand, learned counsel for the accused argued that sulphate and chloride are minerals that are present in all other brands of mineral waters. In addressing this issue, he compared the labels on various mineral water packages which indicated that sulphate and chloride are present together with other minerals.

[21] Below is the comparison table ('Table A') of different mineral water packages label which highlights the mineral contents as in exh. D38.

Types of mineral water	Chloride (mg/L)	Sulphate (mg/L)	RR Jilid 3 - page
Giant	2	4	M/S 164
Spritzer	0.55	10.3	M/S 170
Guardian	5.5	8.2	M/S 176
Ice Mountain	5.5	8.2	M/S 185
Cactus	2.8	56.8	M/S 188
Bleu	5.5	8.2	M/S 194
Dasani	5.5	8.2	M/S 200

[22] After considering the factual argument by learned counsel, I had a thorough look at the relevant provisions in the FR. Regulation 2(5) of the FR provides that food for which such standard is prescribed shall not contain any added substance unless expressly permitted. Sub-regulation 360A(11) of the FR is as follows:

> (11) There **shall be written in the label on a package containing natural mineral water:**
>
> (a) the words "natural mineral water" or, where the product contains added carbon dioxide, the words "carbonated natural mineral water" in uniform lettering of not less than 12 point;
>
> (b) the **amount of total dissolved solids present in mg/l;**
>
> (c) the **name of the mineral contents present and the amount in mg/l** in which each is present;
>
> (d) the pH value of the natural mineral water; and
>
> (e) the location of the source and the nature of the source.
>
> (emphasis added)

[23] Besides the substances allowed in the Twenty-Sixth Schedule of the FR, other substances specifically permissible in the mineral water, as stated on the package label, are dissolved solids and minerals. Since the FR requires that the amount of dissolved solids and minerals be expressly written on the mineral water package label, it lawfully indicates that these substances are allowed to be present in the mineral water.

[24] To my mind, it would be unreasonable and absurd to argue that the substances stated on the mineral water package label are not allowed to be present in the mineral water. If so, then the package label of the mineral water under sub-reg. 360A(11) of the FR does not serve any purpose at all. On this point, I am unable to accede to the argument of the learned DPP. The draftsman of sub-reg. 360A(11) definitely had a purpose in inserting the said provision under the FR.

[25] Furthermore, sub-reg. 360A(11)(b) and (c) unambiguously provide that "total dissolved solids present" and "name of the mineral contents present" which further substantiates that these substances are allowed to be present in the mineral water.

[26] A scrutiny of sub-reg. 360A(11)(c) reveals that the words used in this sub-regulation are "mineral contents" however under the Twenty-Sixth Schedule the term used is "chemical". The words used in both of the provisions are different. Therefore, in construing these words, they must be given different meanings under the FR. In the case of *Kumaran Suppiah v. Dato' Noh Hj Omar & Anor* [2006] 4 CLJ 675, at p. 681 Augustine Paul FCJ said:

A

> It is a rule of construction that **where the terms of an enactment are clear, precise and unambiguous it must be applied and enforced according to its plain meaning** and it is not the function of the court to speculate as to what might have been in the mind of the enacting authority as it may appear to the court from the preamble or otherwise (see *Badri Prasad v. Ram Narain Singh* AIR [1939] All 157). (emphasis added)

B

[27] In *Krishnadas Achutan Nair & Ors. v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 AMR 997 Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal said:

> The function of a Court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant.* (emphasis added)

C

D

Where the provision of a statute is clear, plain and unambiguous, it must be given its natural and literal meaning. Accordingly, it is not the court's duty to add, vary or restrict the meaning of the statute where it is plain and obvious. (see: *Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd* [2020] 9 CLJ 213; [2020] 6 MLRA 51 and *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82).

E

[28] What is a mineral? Under the Act and the FR, the word "mineral" is not defined. The *Concise Oxford Dictionary* (11th edn) defines the word "mineral" as a solid inorganic substance of natural occurrence. The Britannica Dictionary (https://www.britannica.com/science/mineral-chemical-compound) defines mineral as follows:

F

> mineral, naturally occurring homogeneous solid with a definite chemical composition and a highly ordered atomic arrangement; it is usually formed by inorganic processes. There are several thousand known mineral species, about 100 of which constitute the major mineral components of rocks; these are the so-called rock-forming minerals.
>
> …
>
> **A mineral,** which by definition **must be formed through natural processes,** is distinct from the synthetic equivalents produced in the laboratory.
>
> (emphasis added)

G

H

[29] The next issue for determination is whether sulphate and chloride are minerals? According to the *Britannica Dictionary* (https://www.britannica.com/science/mineral-chemical-compound /Sulfates) sulfates (sulphate) is defined as:

I

This class **is composed of a large number of minerals,** but relatively few are common. All contain anionic $(SO_4)^{2-}$ groups in their structures. These anionic complexes are formed through the tight bonding of a central S6+ ion to four neighbouring oxygen atoms in a tetrahedral arrangement around the sulfur. This closely knit group is incapable of sharing any of its oxygen atoms with other SO4 groups; as such, the tetrahedrons occur as individual, unlinked groups in sulfate mineral structures.

(emphasis added)

[30] In my research on minerals, according to the World Health Organization ('WHO') article on sulphate in drinking-water (background document for development of WHO Guidelines for Drinking-water Quality-WHO/SDE/03.04/114), it stated that:

Sulfates occur naturally in numerous minerals, including barite (BaSO4), epsomite (MgSO4·7H2O) and gypsum (CaSO4·2H2O) (Greenwood & Earnshaw, 1984). These dissolved minerals contribute to the mineral content of many drinking-waters.

…

Sulfate was found to be present in 645 of 658 groundwater supplies and in all of the 106 surface water supplies sampled. **Sulfate levels ranged from <1 to 770 mg/litre,** with a median of 4.6 mg/litre. Only 3% of the water supplies sampled had sulfate levels in excess of 250 mg/litre (US EPA,1999a).

…

7. Conclusions

The existing data do not identify a level of sulfate in drinking-water that is likely to cause adverse human health effects.

…

In the light of the above considerations, no health-based guideline value for sulfate in drinking water is proposed. However, there is an increasing likelihood of complaints arising from a noticeable taste as concentrations in water increase above 500 mg/litre. (emphasis added)

[31] In another article by WHO on Chloride in Drinking-water (Background document for development of WHO Guidelines for Drinking-water Quality-WHO/SDE/03.04/03), it states:

Chlorides are widely distributed in nature as salts of sodium (NaCl), potassium (KCl), and calcium (CaCl2).

…

Chloride in surface and groundwater from both natural and anthropogenic sources …

…

A Effects on Humans

A normal adult human body contains approximately 81.7 g chloride. On the basis of a total obligatory loss of chloride of approximately 530 mg/day, a dietary intake for adults of 9 mg of chloride per kg of body weight has been recommended (equivalent to slightly more than 1g of table salt per person per day). For children up to 18 years of age, a daily dietary intake of 45 mg of chloride should be sufficient (4). A dose of 1 g of sodium chloride per kg of body weight was reported to have been lethal in a 9-week-old child (8). Chloride toxicity has not been observed in humans except in the special case of impaired sodium chloride metabolism, *e.g.* in congestive heart failure (13). Healthy individuals can tolerate the intake of large quantities of chloride provided that there is a concomitant intake of fresh water. Little is known about the effect of prolonged intake of large amounts of chloride in the diet. As in experimental animals, hypertension associated with sodium chloride intake appears to be related to the sodium rather than the chloride ion (4).

…

Conclusions

Chloride concentrations in excess of about 250 mg/litre can give rise to detectable taste in water, but the threshold depends upon the associated cations. Consumers can, however, become accustomed to concentrations in excess of 250 mg/litre. No health-based guideline value is proposed for chloride in drinking-water. (emphasis added)

[32] In Malaysia, the standard for water permits the presence sulphate (SO_4) and chloride (Cl) to an acceptable limit of 250 mg/L (see: National Standard for Drinking Water Quality – Ministry of Health, Malaysia).

[33] The sole reason for referring to the above materials is to show that sulphate and chloride are minerals. Under sub-reg. 360A(11) of the FR, mineral contents are allowed to be present in the mineral water. The types of minerals that are permitted are not specified under the FR. In addition, the permissible limit in mg/L of the minerals is also not regulated under the FR. It is crystal clear that the law allows all minerals with no maximum limit of the amount in mg/L to be present in the mineral water. If the FR intends to regulate the types of minerals and amount in mg/L, it must legislate explicit provisions on this matter.

[34] The law requires that the label on the mineral water package must specify the name of the mineral contents present and the amount in mg/L. As stated in D38 and Table A, all the other mineral water brands contain sulphate and chloride together with other minerals such as potassium, calcium, sodium, magnesium and bicarbonate. All these minerals are not listed under the Twenty-Sixth Schedule of the FR. In short, as alluded to earlier these minerals are permissible pursuant to sub-reg. 360A(11) of the FR.

[35] SP4 during cross-examination agreed that the Food Quality Division in Putrajaya approved the label for the mineral water package. This fact further confirms that the mineral contents are allowable in the mineral water. Thus, based on the above reasons, I have no hesitation in concluding that the minerals of sulphate and chloride are permitted in the mineral water and the charge against the accused is unsustainable.

Notice Of Motion AA-44-04-2021

[36] During the submission of the appeal, learned counsel for the accused strenuously contended that the mineral contents are not regulated under the FR. He further submitted that the mineral contents stipulated in the charge are permitted and referred to D38. Finally, it was argued that the evidence of SP3 failed to provide clarification on this issue.

[37] Mineral water is consumed daily in Malaysia and the current issue before this court concerns public safety. Therefore, I suggested to both parties that further evidence on this issue could be tendered. As a result, learned counsel wrote to the Ministry of Health and sought clarification on this matter (encl. 3, exh. PWY1). The Food Safety and Quality Division of the Ministry of Health replied *vide* letter dated 11 March 2021 (exh. PWY 2).

[38] On 7 April 2021, learned counsel filed a notice of motion to admit the letter dated 11 March 2021 as evidence and to include it in the additional appeal record. The learned DPP objected to the application. After considering the submissions from both parties, I allowed the application.

[39] I am aware that the court should only exercise its discretion to allow additional or further evidence in the most exceptional circumstances and conditions.

[40] The Court of Appeal in the case of *Murugayah v. PP* [2004] 2 CLJ 489, on the acceptance of further evidence held:

> It will be observed that the reception of additional evidence is a matter of discretion. It is settled law that the exercise of a discretion must be in accordance with established judicial guidelines. In the case of adducing additional evidence the guidelines were spelt out in *Ladd v. Marshal* [1954] 3 All ER 745 in the form of three conditions. In elaboration of the conditions Lord Parker CJ said in *R v. Parks* [1961] 3 All ER 633 at p. 634:
>
> > Those principles can be summarised in this way. First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not,

A but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

B **[41]** At the trial of this case, the questions relating to mineral and mineral content and whether the mineral contents are regulated under the FR were not adequately addressed. I am satisfied that all the conditions stated in the case of *Murugayah* (*supra*) are fulfilled.

[42] Paragraph 2 of the letter dated 11 March 2021 states that:

C

> Untuk makluman pihak tuan, Sulphate sebanyak 33 mg/L dan Chloride sebanyak 13.4 mg/L yang dikesan dalam Air Mineral Semulajadi adalah merupakan kandungan mineral yang boleh didapati di dalam air mineral semulajadi. Manakala Jadual ke Kedua Puluh Enam seperti di peraturan 360A(7), Peraturan-Peraturan Makanan 1985 adalah merupakan Standard Kimia yang menyatakan Kadar maksimum yang dibenarkan dalam mg/L adalah lebih kepada logam berat (heavy metal).

D

[43] In the interest of justice, I have to accept the clarification given in writing by the Food Safety and Quality Division of the Ministry of Health, as it is the authoritative body in Malaysia on food safety. The said letter clearly explains that sulphate and chloride are mineral contents present in mineral water. Therefore, there is no offence committed by the accused.

E

[44] I would, therefore, allow the appeal of the accused. Accordingly, the conviction be quashed and the sentence is set aside. The appeal by the prosecution on the sentence imposed by the Magistrate is dismissed.

F

G

H

I